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COMMODITY FUTURES TRADING COMMISSION

Swap Data Repositories: Interpretative Statement Regarding the Confidentiality and Indemnification Provisions of the Commodity Exchange Act

AGENCY: Commodity Futures Trading Commission

ACTION: Interpretative statement.

SUMMARY: The Commodity Futures Trading Commission (“Commission” or “CFTC”) is issuing this interpretative statement (“Statement”) to provide guidance regarding the applicability of the confidentiality and indemnification provisions set forth in new section 21(d) of the Commodity Exchange Act (“CEA”) added by section 728 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”). This Statement clarifies that the provisions of CEA section 21(d) should not operate to inhibit or prevent foreign regulatory authorities from accessing data in which they have an independent and sufficient regulatory interest, even if that data also has been reported pursuant to the CEA and Commission regulations.

DATES: Effective date: [INSERT DATE OF PUBLICATION ON FEDERAL REGISTER].

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SUPPLEMENTARY INFORMATION:

I. Background: Statutory and Regulatory Authorities

On July 21, 2010, President Obama signed into law the Dodd-Frank Act.¹ Title VII amended the CEA to establish a comprehensive new regulatory framework for swaps and security-based swaps.² The legislation was enacted to reduce risk, increase transparency and promote market integrity within the financial system by, among other things: (i) providing for the registration and comprehensive regulation of swap dealers and major swap participants; (ii) imposing clearing and trade execution requirements on standardized derivative products; (iii) creating robust recordkeeping and real-time reporting regimes; and (iv) enhancing the Commission's rulemaking and enforcement authorities with respect to, among others, all registered entities and intermediaries subject to the Commission's oversight.

To enhance transparency, promote standardization and reduce systemic risk, section 727 of the Dodd-Frank Act added to the CEA new section 2(a)(13)(G),³ which requires all swaps—whether cleared or uncleared—to be

¹ See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (2010), available at <http://www.cftc.gov/LawRegulation/OTCDERIVATIVES/index.htm>.

² Pursuant to section 701 of the Dodd-Frank Act, Title VII may be cited as the “Wall Street Transparency and Accountability Act of 2010;” 7 U.S.C. 1 et seq.

³ 7 U.S.C. 2(a)(13)(G).

reported to swap data repositories (“SDRs”). SDRs are new registered entities created by section 728 of the Dodd-Frank Act.⁴ SDRs are required to perform specified functions related to the collection and maintenance of swap transaction data and information.⁵

CEA section 21(c)(7) requires that SDRs make data available to certain domestic and foreign regulators⁶ under specified circumstances.⁷ Separately, CEA section 21(d) mandates that prior to receipt of any requested data or information from an SDR, a regulatory authority described in section 21(c)(7) shall agree in writing to abide by the confidentiality requirements described in section 8 of the CEA,⁸ and to indemnify the SDR and the Commission for any expenses arising from litigation relating to the information provided under section 8 of the CEA.⁹

Section 752 of the Dodd-Frank Act seeks to “promote effective and

⁴ Section 721 of the Dodd-Frank Act amends section 1a of the CEA to add a definition of the term “swap data repository.” Pursuant to CEA section 1a(48), the term “swap data repository means any person that collects and maintains information or records with respect to transactions or positions in, or the terms and conditions of, swaps entered into by third parties for the purpose of providing a centralized recordkeeping facility for swaps.” 7 U.S.C. 1a(48).

⁵ See 7 U.S.C. 24a(c). See also Commission, Final Rulemaking: Swap Data Recordkeeping and Reporting Requirements, 77 FR 2136, Jan. 13, 2012 (“Data Final Rules”). The Data Final Rules, among other things, set forth regulations governing SDR data collection and reporting responsibilities under part 45 of the Commission’s regulations.

⁶ The Commission’s regulations designate such regulators as either an “Appropriate Domestic Regulator” or an “Appropriate Foreign Regulator” in § 49.17(b). See Swap Data Repositories: Registration Standards, Duties and Core Principles, 76 FR 54538, 54554 (Sep. 1, 2011) (“SDR Final Rules”).

⁷ 7 U.S.C. 24a(c)(7).

⁸ 7 U.S.C. 12.

⁹ 7 U.S.C. 24a(d).

consistent global regulation of swaps,” and provides that the CFTC and foreign regulatory authorities “may agree to such information-sharing arrangements as may be deemed to be necessary or appropriate in the public interest”¹⁰ In light of this statutory directive, and consistent with section 21 of the CEA, the Commission has been working to provide sufficient access to SDR data to domestic and foreign regulators.

In that regard, the Chairman of the CFTC and the Chairman of the Securities and Exchange Commission (“Chairmen”) jointly submitted a letter to Michel Barnier, European Commissioner for Internal Markets and Services,¹¹ highlighting their desire for international cooperation. In the letter, the Chairmen expressed their belief that indemnification and notice requirements need not apply when a registered SDR is also registered in a foreign jurisdiction and the foreign regulatory authority, acting within the scope of its jurisdiction, seeks information directly from the SDR.

On September 1, 2011, the Commission adopted regulations implementing CEA section 21’s registration standards, duties, and core principles for SDRs.¹² To implement the provisions of sections 21(c)(7) and (d), the Commission adopted definitions and standards for determining access by domestic and foreign regulators to data maintained by SDRs.

The Commission acknowledged in the SDR Final Rules that the CEA’s

¹⁰ See section 752(a) of the Dodd-Frank Act.

¹¹ See letter from Gary Gensler, Chairman of the Commission, and Mary Schapiro, Chairman of the SEC, to Michel Barnier, European Commissioner for Internal Markets and Services, European Commission, dated June 8, 2011.

¹² See, generally, SDR Final Rules.

indemnification requirement could have the unintended effect of inhibiting direct access by other regulators to data maintained by SDRs due to various home country laws and regulations.¹³ The SDR Final Rules provided that under specified circumstances, certain “Appropriate Domestic Regulators”¹⁴ may gain access to the swap data reported and maintained by SDRs without being subject to the notice and indemnification requirements of CEA sections 21(c)(7) and (d).¹⁵ In connection with foreign regulatory authorities, the Commission determined in the SDR Final Rules that confidential swap data reported to and maintained by an SDR may be accessed by an Appropriate Foreign Regulator¹⁶ without the execution of a confidentiality and indemnification agreement when the Appropriate Foreign Regulator has supervisory authority over an SDR registered with it pursuant to foreign law and/or regulation that is also registered with the Commission.

¹³ See SDR Final Rules at 54554.

¹⁴ The term “Appropriate Domestic Regulator” is defined in 17 CFR § 49.17(b)(1) as the Securities and Exchange Commission; each prudential regulator identified in section 1a(39) of the CEA, 7 U.S.C. 1a(39); the Financial Stability Oversight Council; the Department of Justice; any Federal Reserve Bank; the Office of Financial Research; and any other person the Commission deems appropriate.

¹⁵ In the Commission’s view, it is appropriate to permit access to the swap data maintained by SDRs to Appropriate Domestic Regulators that have concurrent regulatory jurisdiction over such SDRs, without the application of the notice and indemnification provisions of sections 21(c)(7) and (d) of the CEA. See SDR Final Rules at 54554 n.163. Accordingly, these provisions do not apply to an Appropriate Domestic Regulator that has regulatory jurisdiction over an SDR registered with it pursuant to a separate statutory authority that is also registered with the Commission, if the Appropriate Domestic Regulator executes a memorandum of understanding (“MOU”) or similar information sharing arrangement with the Commission and the Commission, consistent with CEA section 21(c)(4)(A), designates the Appropriate Domestic Regulator to receive direct electronic access. See 17 CFR § 17(d)(2).

¹⁶ The term “Appropriate Foreign Regulator” is defined in 17 CFR § 49.17(b)(2) as a foreign regulator with an existing MOU or similar type of information sharing arrangement executed with the Commission, and/or a foreign regulator without an MOU as determined on a case-by-case basis by the Commission.

The confidentiality and indemnification provisions of new CEA section 21 apply only when a regulatory authority seeks access to data from an SDR. In the SDR Final Rules, the Commission noted that section 8(e) of the CEA permits the Commission (as opposed to an SDR) to share confidential information in its possession with any department or agency of the Government of the United States, or with any foreign futures authority, department or agency of any foreign government or political subdivision thereof,¹⁷ acting within the scope of its jurisdiction.¹⁸

The SDR Final Rules became effective on October 31, 2011.¹⁹ Under these rules, trade repositories may apply to the Commission for full registration as SDRs. Pending the full implementation of other, related regulatory provisions and definitions, however, such registrations are deemed “provisional.”²⁰

II. The Proposed Interpretative Statement

On May 1, 2012, the Commission issued a proposed interpretative statement (“Proposed Statement”) to address issues raised by interested members of the public and foreign regulatory authorities with respect to the scope and application of the confidentiality and indemnification provisions of new section 21(d) of the CEA.²¹ Under the Proposed Statement, the Commission clarified that the confidentiality and indemnification provisions of CEA section 21(d) should

¹⁷ Section 725(f) of the Dodd-Frank Act amended section 8(e) of the CEA to include foreign central banks and ministries.

¹⁸ See SDR Final Rules at 54554.

¹⁹ Id.

²⁰ See 17 CFR § 49.3(b).

²¹ See 77 FR 26709 (May 7, 2012).

not operate to inhibit or prevent foreign regulatory authorities from accessing data in which they have an independent and sufficient regulatory interest.

The Proposed Statement provided that a registered SDR would not be subject to the confidentiality and indemnification provisions of CEA section 21(d) if: (i) such registered SDR is also registered, recognized or otherwise authorized in a foreign jurisdiction's regulatory regime; and (ii) the data sought to be accessed by a foreign regulatory authority has been reported to such registered SDR pursuant to the foreign jurisdiction's regulatory regime. In addition, because some registered SDRs might also be registered, recognized or otherwise authorized in a foreign jurisdiction and may accept swap data reported pursuant to a foreign regulatory regime, the Commission concluded that the confidentiality and indemnification provisions of CEA section 21(d) generally apply only to such data reported pursuant to the CEA and Commission regulations.

As detailed in Section III.B., interested members of the public and a foreign regulatory authority responded to the Commission's request to receive public comments on all aspects of the Proposed Statement.²² In adopting this Statement, the Commission has carefully considered these comments.

III. Considerations Relevant to the Commission's Statement²³

A. International Considerations

As noted above, section 752(a) of the Dodd-Frank Act directs the

²² See public comment file in response to the Proposed Statement, available at <http://comments.cftc.gov/PublicComments/CommentList.aspx?id=1198>.

²³ Legislation has been introduced in Congress that would amend the CEA to eliminate or substantially limit the SDR indemnification provision. As discussed in Section III.B., commenters expressed the general view that a "legislative fix" would be the best course of action to resolve issues regarding the section 21(d) requirements.

Commission to consult and coordinate with foreign regulatory authorities regarding the establishment of consistent international standards for the regulation of swaps and various “swap entities.” Section 752(a) also provides that the Commission “may agree to such information-sharing arrangements [*with foreign regulatory authorities*] as may be deemed to be necessary or appropriate in the public interest” or for the protection of investors and counterparties.²⁴

The Commission is committed to a cooperative international approach to the registration and regulation of SDRs, and consulted extensively with various foreign regulatory authorities in promulgating both its proposed and final regulations concerning SDRs and in the finalization of the Proposed Statement²⁵. The Commission notes that the SDR Final Rules are largely consistent with the recommendations and goals of the May 2010 “CPSS-IOSCO Consultative Report, Considerations for Trade Repositories in the OTC Derivatives Market” (“Working Group Report”).²⁶

Consistent with the international harmonization envisioned by section 752

²⁴ See section 752(a) of the Dodd-Frank Act.

²⁵ See public comment file in response to the proposal for the SDR Final Rules, available at <http://comments.cftc.gov/PublicComments/CommentList.aspx?id=939> and SDR Final Rules note 6 at 54539, *supra*.

²⁶ This working group was jointly established by the Committee on Payment and Settlement Systems (“CPSS”) of the Bank of International Settlements and the Technical Committee of the International Organization of Securities Commissions (“IOSCO”). The Working Group Report presented a set of factors to consider in connection with the design, operation and regulation of SDRs. A significant focus of the Working Group Report is access to SDR data by appropriate regulators. The Working Group Report urges that a trade repository “should support market transparency by making data available to relevant authorities and the public in line with their respective information needs.” The Working Group Report is available at <http://www.bis.org/publ/cpss90.pdf>. See also CPSS-IOSCO Consultative Report, Principles of Financial Market Infrastructures (March 2011) available at <http://www.bis.org/publ/cpss94.pdf> (“PFMI Report”). See also Financial Stability Board (“FSB”), Implementing OTC Derivatives Market Reforms, Oct. 25, 2010 (“FSB Report”); FSB, Derivative Market Reforms, Progress Report on Implementation, Apr. 15, 2010 (“FSB Progress Report”).

of the Dodd-Frank Act, the Commission has engaged in consultations with foreign regulatory authorities regarding the Commission's adoption and implementation of regulations and the issuance of interpretative guidance relating to the Dodd-Frank Act. In this context, foreign regulatory authorities have expressed concern about the difficulty in complying with the indemnification provisions of CEA section 21(d).

B. Comments on the Proposed Statement²⁷

The Depository Trust & Clearing Corporation ("DTCC") stated its support of the adoption of the Proposed Statement as a "necessary first step". Nevertheless, DTCC concluded that the statutory language at issue requires a "legislative fix" to clarify the scope and applicability of the confidentiality and indemnification provisions of CEA section 21(d) because "the indemnification requirement" would limit the sharing of trade repository data across borders. DTCC noted that a foreign regulator might have an interest in SDR data related to a swap transaction entered into by parties not subject to the foreign regulator's "oversight authority." In this regard, DTCC noted concerns expressed by foreign regulatory authorities who believe that a "jurisdictional nexus" would nonetheless exist with respect to the terms of swap transactions (e.g., swap transactions using currencies or underlying reference entities subject to a foreign regulator's

²⁷ The Commission received five comments, four of which regard the Proposed Statement. All comment letters are available on the Commission Web site at <http://comments.cftc.gov/PublicComments/CommentList.aspx?id=1198>. Specific comment letters are identified by the submitter. Comments addressing the Proposed Statement were received from: (i) the European Securities and Markets Authority, June 5, 2012; (ii) the Financial Services Roundtable, June 6, 2012; (iii) Cloud Strategix, LLC, June 5, 2012; and (iv) the Depository Trust & Clearing Corporation, June 6, 2012. The fifth comment regards the implementation of section 619 of the Dodd-Frank Act.

oversight authority) that are not reported “pursuant to the foreign jurisdiction’s regulatory regime.” DTCC pointed out that access to such swap transaction data that is not reported “pursuant to the foreign jurisdiction’s regulatory regime” would not be available unless the foreign regulator enters into a confidentiality and indemnification agreement with the SDR.

DTCC also suggested certain substantive modifications to the Proposed Statement.²⁸ Among them, DTCC suggested that the Commission expand on the meaning of “registered, recognized or otherwise authorized” in the Proposed Statement or, alternatively, state that operation in accordance with the PFMI Report would mean that an SDR is “authorized” for purposes of this Statement.

The European Securities and Markets Authority (“ESMA”) noted that it considers the Commission’s “recognition of foreign regimes and the access to data requirements originating from them” under the Proposed Statement as a “step in the right direction” that would allow relevant European authorities to obtain data in accordance with relevant European Union laws and forthcoming regulations. However, ESMA noted its concern that the Commission’s interpretation of the indemnification provision of CEA section 21(d) “cannot overrule the [Dodd-Frank] Act itself” and concluded that “the confidentiality and indemnification issue could only be fully addressed with a legislative amendment

²⁸ DTCC suggested that the Commission consider the following modifications to the Proposed Statement: (i) provide that no registration or licensing would be necessary with respect to the condition that a registered SDR is also registered, recognized or otherwise authorized in a foreign jurisdiction’s regulatory regime; (ii) provide that SDRs operating in accordance with principles relevant to trade repositories under the PFMI Report should be deemed authorized; and (iii) provide that with respect to the condition that the SDR data sought to be accessed by a foreign regulator is reported pursuant to the foreign jurisdiction’s regulatory regime, the meaning attributed to regulatory regime includes a foreign jurisdiction’s adherence to the PFMI Report provisions outlined for market regulators.

by repealing the original provision in the Dodd-Frank Act". In addition, consistent in part with DTCC's comment, ESMA noted that relevant European Union authorities could have an interest in accessing swap transaction data reported to a registered SDR pursuant to the Dodd-Frank Act, but not reported pursuant to European Union laws and forthcoming regulations. Accordingly, ESMA suggested certain modifications to the Proposed Statement.²⁹

The Financial Services Roundtable ("FSR") requested that the Commission support a legislative solution which would remove the indemnification provision from CEA section 21(d). FSR also requested that the Commission continue its discussions with regulators in other jurisdictions as well as its participation in standard-setting bodies to develop international standards relevant to the swap markets.

Cloud Strategix, LLC ("Cloud Strategix"), representing the data hosting and cloud computing industry, in relevant part expressed a general concern with respect to the "several costs, unintended consequences, and impracticalities" related to the Proposed Statement and the SDR Final Rules. Specifically, Cloud Strategix noted that the Proposed Statement "does not seem to consider the great cost to the data center that hosts the SDR in assisting the SDR with compliance with foreign regulators." In this context, Cloud Strategix suggested that the Commission "provide an exemption for all data centers to indemnify SDRs for

²⁹ ESMA suggested that the Commission consider the following alternative modifications to the Proposed Statement: (i) delete the second condition of the Proposed Statement (i.e., "The data sought to be accessed by a foreign regulatory authority is reported to such registered SDR pursuant to the foreign regulatory regime."); or (ii) add the following bracketed language to the second condition such that it would read as follows: "The data sought to be accessed by a foreign regulatory authority has been reported to such registered SDR pursuant to the foreign jurisdiction's regulatory regime [or the foreign regulatory authority is entitled to access such data pursuant to its regulatory regime to fulfill its respective responsibilities and mandates.]"

regulatory inquiries, enforcement proceedings, or litigation for both foreign and domestic regulators.”

C. Commission Determination

After considering the comments received to the Proposed Statement and following the aforementioned consultations with foreign regulatory authorities pursuant to the Congressional mandate for cooperation in section 752 of the Dodd-Frank Act, the Commission has concluded that the guidance described in the Proposed Statement is necessary to ensure that appropriate access by foreign regulatory authorities is not unnecessarily inhibited. Accordingly, while the SDR Final Rules address foreign regulators with supervisory authority and regulatory responsibility, the Commission is issuing this Statement to ensure that foreign regulators receive sufficient access to data reported to SDRs where such foreign regulators have an independent and sufficient regulatory interest.

In response to DTCC’s comment regarding expanding on the meaning of “registered, recognized or otherwise authorized” of the Proposed Statement or, alternatively, stating that operation in accordance with the PFMI Report would mean that an SDR is “authorized” for purposes of this Statement, the Commission believes, consistent with DTCC’s comment, that a foreign regulator with “oversight responsibilities” of an SDR pursuant to the regulatory regime of the applicable foreign jurisdiction would meet the “registered, recognized or otherwise authorized” prong herein. Nonetheless, the Commission declines to express a more detailed view on the regulatory or jurisdictional structures applicable to SDRs governed within foreign jurisdictions that would meet the

“registered, recognized or otherwise authorized” prong herein. As the Commission indicated in its Proposed Statement, access by foreign regulatory authorities “should be governed by such foreign jurisdiction’s regulatory regime,” and the Commission believes that “registered, recognized or otherwise authorized” is sufficiently broad to cover a wide variety of foreign regulatory structures and regimes.

Similarly, and in response to DTCC’s and ESMA’s comment regarding accessing data which is not reported pursuant to European Union laws and forthcoming regulations, the Commission acknowledges the difficulty that certain foreign regulators may face in this regard. The Commission reiterates that foreign and domestic regulators may nonetheless be able to receive confidential data from the Commission without the execution of a confidentiality and indemnification agreement.

In response to FSR’s comment regarding consultations and participation with standard-setting bodies, the Commission agrees and notes its participation in various international regulatory and industry-led working groups.³⁰

In response to the cost-benefit considerations raised by Cloud Strategix, the Commission has previously acknowledged such costs in its consideration of the costs and benefits of compliance with its SDR Final Rules³¹ and Data Final

³⁰ Among the working groups the Commission is actively participating in to develop consistent international standards are the FSB, CPSS and IOSCO working group on data access (see *infra* n. 36), the Technical Committee of IOSCO which developed the “Report on OTC derivatives and aggregation requirements,” and the FSB’s Legal Entity Identifier Expert Group.

³¹ See SDR Final Rules, *supra* n. 6, at 54572.

Rules.³² The Commission does not believe that the Proposed Statement changes or modifies its earlier consideration of the costs and benefits of the applicable final rules.

IV. Interpretative Statement

In consideration of the foregoing, the Commission is providing guidance regarding the confidentiality and indemnification provisions of CEA section 21(d) by adopting the substance of the Proposed Statement. In this regard, the Commission seeks to ensure an orderly transition to the Dodd-Frank Act's swap data reporting regime by providing certainty to market participants and regulators with respect to the confidentiality and indemnification provisions of CEA section 21(d).

A. Data Reported to Registered SDRs

The Commission understands that some registered SDRs also may be registered, recognized or otherwise authorized in a foreign jurisdiction and may accept swap data reported pursuant to the foreign regulatory regime. The Commission concludes that the confidentiality and indemnification provisions of CEA section 21(d) generally apply only to such data reported pursuant to the CEA and Commission regulations.

The Commission further concludes that the confidentiality and indemnification provisions should not operate to inhibit or prevent foreign regulatory authorities from accessing data in which they have an independent and sufficient regulatory interest (even if that data also has been reported pursuant to the CEA and Commission regulations).

³² See Data Final Rules, supra n. 5, at 2176.

Accordingly, and consistent with the Commission's SDR Final Rules, the Commission interprets CEA section 21(d) such that a registered SDR would not be subject to the confidentiality and indemnification provisions of that section if:

- Such registered SDR also is registered, recognized or otherwise authorized in a foreign jurisdiction's regulatory regime; and
- The data sought to be accessed by a foreign regulatory authority has been reported to such registered SDR pursuant to the foreign jurisdiction's regulatory regime.

This Statement is grounded in principles of international law and comity. For example, in F. Hoffmann-La Roche Ltd. v. Empagran S.A., the U.S. Supreme Court, in reviewing the extraterritorial applicability of a different federal statute, stated that extraterritorial jurisdiction should be construed, where ambiguous, "to avoid unreasonable interference with the sovereign authority of other nations."³³ In cases considering concepts of international law and comity in evaluating the extraterritorial scope of federal statutes, the Supreme Court has noted that the principles in the Third Restatement of Foreign Relations Law are relevant to the interpretation of U.S. law.³⁴

Specifically, section 403 of the Third Restatement of Foreign Relations Law states, in relevant part:

³³ F. Hoffmann-LaRoche, Ltd. v. Empagran S.A., 542 U.S. 155, 164 (2004). In Hoffmann-LaRoche, the Supreme Court also stated that canons of statutory construction "assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws." Id.

³⁴ Id. at 164-165.

Whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors, including, where appropriate:

- (a) The link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;
- (b) The connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;
- (c) The character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;
- (d) The existence of justified expectations that might be protected or hurt by the regulation;
- (e) The importance of the regulation to the international political, legal, or economic system;
- (f) The extent to which the regulation is consistent with the traditions of the international system;
- (g) The extent to which another state may have an interest in regulating the activity; and
- (h) The likelihood of conflict with regulation by another state.³⁵

To avoid unnecessary interference with the sovereign authority of foreign regulatory authorities, this Statement is supported and underpinned by principles of international law and comity.

B. Foreign Regulatory Access

³⁵ Rest. 3d., Third Restatement Foreign Relations Law section 403 (scope of a statutory grant of authority must be construed in the context of international law and comity including, as appropriate, the extent to which regulation is consistent with the traditions of the international system).

In the Commission's view, a foreign regulator's access to data held in a registered SDR that also is registered, recognized, or otherwise authorized in a foreign jurisdiction's regulatory regime, should be governed by such foreign jurisdiction's regulatory regime where the data sought to be accessed has been reported pursuant to that regulatory regime. The Commission concludes that it is appropriate not to apply the requirements of CEA section 21(d) in these circumstances, in light of, among other things, the importance of such data to the foreign jurisdiction's regulatory regime, foreign regulators' interest in unfettered access to such data, and the traditions of mutual trust and cooperation among international regulators.³⁶

Therefore, the Commission concludes that a foreign regulator's access to data from a registered SDR that also is registered, recognized, or otherwise authorized in a foreign jurisdiction's regulatory regime, where the data to be accessed has been reported pursuant to that regulatory regime, will be dictated by that foreign jurisdiction's regulatory regime and not by the CEA or Commission regulations. Such access is appropriate, in the Commission's view, even if the applicable data is also reported to the registered SDR pursuant to the Commission's Data Final Rules.³⁷

³⁶ The Commission notes that access to data held by trade repositories is a concept under discussion and development among international regulators. At the request of the FSB, CPSS and IOSCO have established a working group of relevant authorities to produce a forthcoming report regarding authorities' access to trade repository data.

³⁷ Regarding the Commission's access to SDR data, section 21(b)(1)(A) of the CEA states that the Commission "shall prescribe standards that specify the data elements for each swap that shall be collected and maintained by each registered swap data repository." Section 21(c)(1) of the CEA requires registered SDRs to "accept data prescribed by the Commission for each swap under subsection (b)." With respect to Commission access to data held in registered SDRs, the Commission concludes that the direct electronic access provisions of CEA section 21(c)(4) apply

Additionally, the Commission reiterates that a foreign regulatory authority, like domestic regulators, can nonetheless receive confidential data, without the execution of a confidentiality and indemnification agreement, from the Commission (as opposed to an SDR) pursuant to section 8(e) of the CEA.³⁸ Such data sharing and access would be governed by the confidentiality provisions of section 8 of the CEA.³⁹ The Commission is committed to continuing its close cooperation with: (i) foreign regulatory authorities to promptly address such information requests; and (ii) registered SDRs that request the Commission's assistance in determining if a foreign regulatory authority has an independent and regulatory interest in data that has been reported to such registered SDR pursuant to the relevant foreign jurisdiction's regulatory regime.

Issued in Washington, DC on October 22, 2012 by the Commission.

Stacy D. Yochum

Counsel

only to such data that the SDR is required to accept under section 21(c)(1), which is further defined by part 45 of the Commission's regulations. In this respect, the Commission concludes that its direct electronic access applies only to such data reported pursuant to section 21 and Commission regulations promulgated thereunder.

³⁸ CEA section 8(e), 7 U.S.C. 12(e), allows the Commission to share confidential information in its possession obtained in connection with the administration of the CEA with "any department or agency of the Government of the United States" or with any foreign futures authority or a department, central bank or ministry, or agency of a foreign government or political subdivision thereof, acting within the scope of its jurisdiction.

³⁹ 7 U.S.C. 12.

Appendices to Swap Data Repositories: Interpretative Statement Regarding the Confidentiality and Indemnification Provisions of Section 21(d) of the Commodity Exchange Act--

NOTE: The following appendices will not appear in the Code of Federal Regulations.

Appendix 1—Commission Voting Summary

On this matter, Chairman Gensler and Commissioners Chilton and Wetjen voted in the affirmative; Commissioners Sommers and O'Malia voted in the negative.

Appendix 2- Statement of Chairman Gary Gensler

I support the final interpretative guidance regarding the confidentiality and indemnification provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act).

The confidentiality and indemnification provisions in the Dodd-Frank Act state that before a registered swap data repository (SDR) may share information with certain domestic and foreign regulators, those regulators must first agree in writing to abide by the confidentiality provisions of Section 8 of the Commodity Exchange Act (CEA). In addition, the Dodd-Frank Act requires that regulators also must indemnify both the SDR and the Commodity Futures Trading Commission (Commission) for any expenses arising from litigation relating to the information provided under Section 8 of the CEA.

The Commission recognizes the importance to foreign regulators of swap data reported under foreign regulatory regimes. The Commission's final SDR rules specified that confidential swap data reported to and maintained by an SDR may

be accessed by an “appropriate foreign regulator” without a confidentiality and indemnification agreement when the SDR is also registered with that foreign regulator.

To provide further clarity for foreign regulators, the Commission is issuing this interpretative guidance on the Dodd-Frank Act confidentiality and indemnification provisions. The final interpretative guidance makes clear that a foreign regulator will not be prevented from accessing data in which it has an independent and sufficient regulatory authority over the SDR and such data has been reported pursuant to the foreign jurisdiction’s regulatory regime.

With this interpretive guidance, the Commission has taken another important step to ensure appropriate access to SDRs by foreign regulatory authorities consistent with the provisions of the Dodd-Frank Act.

Appendix 3—Statement of Commissioners Jill E. Sommers and Scott D. O’Malia
We respectfully dissent from issuing this Final Interpretative Statement Regarding the Confidentiality and Indemnification Provisions of Section 21(d) of the Commodity Exchange Act (CEA) (Final Interpretative Statement). When the Commission issued the proposed guidance (Proposed Interpretative Statement) in May of this year, we were concerned that the statement did not actually solve the problem with the statutory language beyond providing some additional clarity to the Swap Data Repository (SDR) rules and we called for a permanent solution by way of a legislative repeal of the indemnification provisions.

When finalizing the SDR rules, the Commission stated that a foreign regulator may have direct access to confidential swap data reported to and maintained by an SDR registered with the Commission without executing a Confidentiality and Indemnification Agreement when the SDR is also registered with the foreign regulator and the foreign regulator is acting in a regulatory capacity with respect to the SDR. *See Swap Data Repositories: Registration Standards, Duties and Core Principles*, 76 FR 54,538, 54,554 (Sept. 1, 2011). The Final Interpretative Statement expands this to SDRs that are registered, recognized or otherwise authorized in a foreign regulator's regulatory regime and clarifies that direct access to data should be granted even if the data the foreign regulator seeks also has been reported pursuant to the CEA and Commission regulations.

The Commission received a comment from the European Securities and Markets Authority (ESMA) suggesting that we consider modifying the conditions that would need to be met so that a foreign regulator could escape being subject to the indemnification provisions. Specifically, ESMA suggested that the Commission consider the following alternative modifications: (1) delete the second condition of the Proposed Interpretative Statement, (i.e., "The data sought to be accessed by a foreign regulatory authority is reported to such registered SDR pursuant to the foreign regulatory regime"), which would leave the sole condition that the SDR be registered, recognized or otherwise authorized in the foreign regulatory regime; or (2) add language to the second condition such that it would read as follows: "The data sought to be accessed by a foreign regulatory authority has been reported to such registered SDR pursuant to the foreign

jurisdiction's regulatory regime *or the foreign regulatory authority is entitled to access such data pursuant to its regulatory regime to fulfill its respective responsibilities and mandates.*" Although the Commission acknowledges the comment in the Final Interpretative Statement, we do not adopt either suggestion and do not justify their exclusion.

Our second concern involves the distinction the Commission made in the SDR rules between an Appropriate Domestic Regulator and an Appropriate Domestic Regulator with Regulatory Responsibilities. Under the current rules only the CFTC and the SEC are able to directly access SDR data absent an indemnification agreement. All other U.S. Regulators (i.e. "Appropriate Domestic Regulators") would have to execute an indemnification agreement—something that we are told they are prohibited from doing. Adopting the second ESMA option and extending it to Appropriate Domestic Regulators would allow them direct access to data they believe is necessary to fulfill their regulatory mandate, and in our view is something that is within the Commission's discretion. Instead, the Commission has purposely chosen to interpret the statute in a manner that constrains other domestic regulators' ability to examine swap market data. For these reasons we cannot support the guidance issued today by the Commission.

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